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Nos. ~~445 and 484~~

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Supreme Court of the United States

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OCTOBER TERM, 1965

No. ~~445~~ 15

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellants,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

No. ~~484~~ 17

CALUMET HARBOR TERMINALS, INC. AND NORTH PIER TERMINAL COMPANY,
Appellants,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

MOTION TO AFFIRM.

JOHN L. BORDES,
MARTIN L. CASSELL,
THEODORE E. DESCH,
139 W. Van Buren St.,
Chicago, Illinois 60605,
Attorneys for Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, Appellees.

THE SHERIDAN-BLAKELY PRINTING COMPANY, CHICAGO

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ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
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Appellees, Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the

United States, move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT.

These are direct appeals from the final judgment and decree entered on April 30, 1965,* by a district court of three judges specially constituted pursuant to 28 U. S. C. §§ 2284 and 2325, vacating certain orders of the Interstate Commerce Commission (Commission) and remanding the case to the Commission for the taking of further evidence on all issues raised in the proceeding.

By the first set of applications filed with the Interstate Commerce Commission** beginning in 1956, the railroad appellants*** herein sought to extend their railroad operations for the first time to the property of the Chicago Regional Port District (Port District) on the west and south sides of Lake Calumet in the City of Chicago, Illinois, which had been—and is presently—served exclusively by appellee, Chicago, Rock Island and Pacific Railroad Company (Rock Island) through operations over the property of its wholly owned subsidiary, Pullman Railroad Company (Pullman). Appellee, New York, Chicago and

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* Reported at 241 F. Supp. 947.

** Finance Docket No. 19538, Illinois Central Railroad Company, et al.,—Construction and Trackage Rights—Lake Calumet Harbor, Cook County, Illinois; Finance Docket No. 19742, The Belt Railway Company of Chicago—Trackage Rights, etc.; Finance Docket No. 19921, Michigan Central Railroad Company, et al.,—Trackage Rights.

*** Illinois Central Railroad Company (Illinois Central), The Pennsylvania Railroad Company (Pennsylvania), Chicago South Shore and South Bend Railroad (South Shore), The Belt Railway Company of Chicago (Belt), The Michigan Central Railroad Company (Michigan Central), The New York Central Railroad Company (New York Central) and Indiana Harbor Belt Railroad Company (IHB), appellants in No. 445.

St. Louis Railroad Company (Nickel Plate)* serves the east side of the lake.

The Commission issued a report and order on October 5, 1959** (307 I. C. C. 493), granting the railroad appellants authority to extend their railroad operations up to the boundaries of the Port District's property but finding that operation over the tracks of the Port District would require the specific approval of the Commission after the filing of additional applications.

The facts that appellees were serving or available to serve the port and that their railroad service had been entirely satisfactory to the shipping public were for all practical purposes undisputed at the hearing before the Commission.

One of the bases of the Commission's grant of authority to the railroad appellants to extend their operations to the property of the Port District was the hope that there might be 27,000 cars of traffic at the port in 1958 and 76,500 cars of traffic in 1962. The testimony on which these estimates were based was that of the Manager of the Port District who admitted that these figures were merely estimates of the potential if, as and when the facilities on the east side of the lake were fully constructed and operated at full capacity the year around. As of the hearing in 1957, the port was only 10% developed and its completion was conjectural. No evidence was offered that the port will ever operate at full capacity the year around; in fact the shipping season on the Great Lakes is limited to the warmer months.

The railroad appellants filed three successive sets of applications with the Commission, each set covering a separate aspect of their proposed operation.

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* Nickel Plate was merged into Norfolk and Western Railway Company after the complaints were filed in the District Court.

** Appendix C of the railroad appellants' jurisdictional statement.

In the first set of applications the railroad appellants sought authority to build certain tracks and to operate over these tracks to the entrance to the property of the Port District. These applications were approved by the Commission in its order of October 5, 1959 (307 I. C. C. 493).

In the second set of applications the railroad appellants sought authority to operate within the port and asked approval of a proposed lease of the Port District's tracks. These applications were approved by the Commission in its order of September 19, 1960* (312 I. C. C. 277).

In the third set of applications the railroad appellants sought approval of a contract for the nonexclusive use of the Port District's tracks. The contract differed materially from the lease approved by the Commission in its order of September 19, 1960. This, the ultimate contract, was approved by the Commission in its order of November 26, 1962** (317 I. C. C. 502).

At the hearing on the first set of applications the railroad appellants presented a proposed lease of the Port District's tracks which had not been executed nor even discussed with the Port District. The Commission approved the lease, subject to the deletion of a provision which the Commission found objectionable, notwithstanding that the lease was not then in existence and even though no application to operate over the tracks was then before the Commission.

With the second set of applications, the railroad appellants presented to the Commission for approval a different lease of the Port District's tracks, the form of which was approved by the Commission in its order of September 19, 1960. This lease was never executed.

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* Appendix D of the railroad appellants' jurisdictional statement.

** Appendix E of the railroad appellants' jurisdictional statement.

The third set of applications dealt with a new agreement for the nonexclusive use of the Port District's tracks differing in material respects from the lease approved by the Commission in its order of September 19, 1960. This agreement was executed by the railroad appellants and the Port District and presented by the railroad appellants to the Commission for filing. The Commission stated that the filing did not constitute approval by the Commission and suggested to the railroad appellants that they might wish to file an application for approval of the agreement. They then filed with the Commission an application for approval of an agreement for nonexclusive use of the Port District's tracks. The second and third sets of applications related, respectively, to a lease which was approved by the Commission but not entered into by the parties and the nonexclusive use agreement which was executed by the parties but not approved by the Commission until the Commission suggested that an application for such approval should be filed.

After the railroad appellants filed their application for approval of the nonexclusive use agreement, the Commission then directed them to file copies of an operating agreement governing their method of operation over the tracks covered by the nonexclusive use agreement (the execution and approval of the operating agreement by the Port District was required before the nonexclusive use agreement with the Port District could, by its terms, become effective). The railroad appellants then filed a document entitled "Submission" in which they referred to a proposed operating agreement which was agreed to in "principle" between the railroad appellants and introduced as an exhibit at the hearing but which was an unsigned document. On August 23, 1962, the Commission entered an order* which, among other things, required the railroad appellants to

* Appendix F of the railroad appellants' jurisdictional statement.

file within 30 days an executed copy of the operating agreement showing approval by the Port District or face a possible vacation of the order dated September 19, 1960, and denial of the pending application. The railroad appellants then complied with the order of the Commission and by its report and order of November 26, 1962, the Commission approved the nonexclusive use agreement entered into between the railroad appellants and the Port District.

Appellees were denied a hearing on the second and third sets of applications which sought approval of various leases and agreements, one of which—the nonexclusive use agreement—was ultimately approved by the Commission.

ARGUMENT.

The Court below correctly determined that the decision of the Commission was not supported by the record of the hearing and that due process of law had been denied appellees in that hearings were not held on certain material issues.

I.

These appellees are aware that the scope of judicial review of an order of the Interstate Commerce Commission is limited, and that the reviewing court may not set aside an order entered within the ambit of the Commission's statutory authority if the Commission has correctly applied the law and if the order is in fact based upon adequate findings, founded upon substantial evidence, or is a rational conclusion of the matter involved in the light of the entire record. However, the reviewing court must set aside the Commission's decision if it cannot conscientiously find that the Commission has correctly applied the law, that the findings of the Commission are adequate and accurate, and that the evidence supporting that decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Commission's view. See *Mayfield Sons Trucking Company* v. *United States*, 234 F. Supp. 655. In construing the Administrative Procedure Act this Court stated in *Universal Camera Corp.* v. *Labor Board:*

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evi-

dence supporting that decision is substantial, when viewed in the light that the record furnished including the body of evidence opposed to the Board's view." (304 U. S. 474, 488).

The railroad appellants and the terminal company appellants* cite *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 and other cases to support their contention that the Court below has substituted its judgment for the Commission's. These cases do stand for the principle that the reviewing court cannot substitute its view for the Commission's if the Commission's order has support in the record and the applicable law. With this principle of law these appellees do not quarrel. In the opinion below, the District Court first sets forth the issues of law presented to it. It next states findings of fact for which it finds support in the record. Then it states the Commission's conclusions based upon those findings and ultimately determines that the record does not offer ample support in fact and law for those conclusions. These appellees submit that the Court below has not substituted its judgment for that of the Commission but that it has correctly rendered its decision within the scope of the mandate delineated in the Administrative Procedure Act.**

II.

The Court below correctly concluded that appellees were denied due process of law when they were not granted hearings on the supplemental applications dealing with the various agreements which culminated in the nonexclusive use agreement covering the railroad appellants'

* Calumet Harbor Terminals, Inc. and North Pier Terminal Company, appellants in No. 484.

**Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009 (a part of Appendix G of the railroad appellants' jurisdictional statement).

use of the Port District's tracks. The appellants in their jurisdictional statements make much of the argument that no hearing was necessary because the nonexclusive use agreement was consummated after bargaining between the railroad appellants and the Port District at arm's length. The Court below correctly determined that the rental provisions under the final agreement differ materially from the rental provisions under the lease originally proposed. Since appellees will be required to operate under the terms of the nonexclusive use agreement (if the railroad appellants ultimately succeed in extending their operations to the port; see the Commission's order of November 26, 1962, 317 I. C. C. 502, 506) entered into between the railroad appellants and the Port District, the District Court correctly concluded that, because appellees were not granted a hearing in which to present evidence or to cross-examine the contracting parties concerning the agreement, appellees were denied due process. This was not only the conclusion of the majority of the Court below but also the conclusion reached in the dissenting opinion.

The appellants seek to excuse the lack of due process in the denial of a hearing on the nonexclusive use agreement by reference to the Commission's finding (317 I. C. C. 502, 507) that some of the terms of the agreement "should be more favorable" than those of the lease which had been approved previously. Due process cannot be based upon mere conjecture that a contract "should" be more favorable. It is plain that the District Court determined that the Commission's conclusion as to the "favorable" effect of the agreement is not supported by the record. The Court below correctly stated:

• • • • •

> "A major deficiency exists because the rental provisions under the final plan differ materially from the

rental provisions under the plan originally proposed.

"The record shows what the rental rates will be, but does not show what effect those rates will have on the overall operating costs. This is important because the rental is dependent upon the number of cars handled. The only evidence on the effect of specific rates relates to the proposed rates which were never put into effect." (241 F. Supp. 974, 982).

• • • • •

The appellants urge that petitions for rehearing, reconsideration, reargument or "further hearing" lie in the sound discretion of the Commission and, in support of this proposition, again cite the case of *United States* v. *Pierce Auto Freight Lines, Inc., supra.* Appellees sought no *rehearing* or "*further* hearing" (emphasis supplied) on the issues raised by the nonexclusive use agreement. They merely requested an *initial* hearing which was unlawfully refused.

CONCLUSION.

These appellees therefore respectfully submit that the appellants submit no substantial question for the decision of this Court and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

JOHN L. BORDES,
MARTIN L. CASSELL,
THEODORE E. DESCH,
139 W. Van Buren St.,
Chicago, Illinois 60605,
Attorneys for Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, Appellees.

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